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No. 07-543

IN THE

Supreme Court of the United States

AT&T CORPORATION,

Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT AND SUPPLEMENTAL BRIEF FOR RESPONDENTS

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

Pursuant to Rules 25.5 and 25.6 of the Rules of this Court, respondents respectfully seek leave to file the attached supplemental brief.

After oral argument in this case, on January 29, 2009, the President signed into law the Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009). The legislation was enacted to supersede this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), and to clarify the time limits for filing compensation discrimination claims under Title VII of the Civil Rights Act of 1964.

Respondents respectfully request leave to file the attached supplemental brief addressing the effect of the Lilly Ledbetter Fair Pay Act on the proper disposition of this case.

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

In both this case and in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S. Ct. 2162 (2007), this Court has been called upon to grapple with two competing models for Title VII's treatment of past practices that have a subsequent effect on workers' compensation. On the one side is *Bazemore* v. *Friday*, 478 U.S. 385 (1986), which held that an employer committed a new violation of Title VII with each paycheck that reflected a discrepancy arising from discriminatory pay decisions made before the effective date of the Act. On the other side is *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), which held that a new unlawful employment practice does not arise every time an employee feels the present effect of a past unlawful employment practice.

Reasonable policy arguments can be made in favor, or against, either model as a basic framework for thinking about when the current compensation effects of past decisions and practices should be subject to present challenge under Title VII. At the time this Court decided *Ledbetter*, the text of the statute did not speak clearly to the question, leaving the Court to draw the line, as best it could, dividing cases subject to the rule of *Evans* and those falling within the broader rule of *Bazemore*. In *Ledbetter*, this Court followed the *Evans* model, holding that paychecks reflecting prior discriminatory pay decisions do not give rise to new violations of Title VII. 127 S. Ct. at 2171-72. The Court held that the model of *Bazemore* was reserved for a limited class of

cases in which an "employer issues paychecks using a discriminatory pay structure." *Id*. at 2174.

Congress responded by enacting the Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009) (LLFPA). After concluding that the decision in *Ledbetter*, "is at odds with the robust application of the civil rights laws that Congress intended," *id*. § 2(2), the statute provides, in most relevant part:

> For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Id. § 3.

The new statute thus rejects *Evans*, and embraces *Bazemore,* as the proper model for addressing past discriminatory compensation decisions and other practices that have a subsequent effect on compensation. And in so doing, the Act confirms that respondents' claims in this case were timely and do not depend on a retroactive application of the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, § 995, 92 Stat. 2076.

I. The New Statute Applies To Respondents' Claims.

The new statute applies to this case.

1. Although the LLFPA was enacted after the conduct at issue here, Congress expressly applied it "to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 . . . that are pending on or after [May 28, 2007]." LLFPA § 6. In *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), this Court recognized that such language unambiguously defines the temporal reach of the statute, obviating any need to rely on the presumption against retroactivity. *See id*. at 255-57, & n.8, 263, 280; *see also Martin v. Hadix*, 527 U.S. 343, 354-55 (1999); *Int'l Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 241-43 (1976).

2. Respondents' claims fall within the terms of the statute.

a. First, the Court has long recognized that "pension benefits . . . are 'compensation' under Title VII." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 712 n.23 (1978). In fact, the Act's findings demonstrate that Congress contemplated the Act's application to pensions, *see* LLFPA § 2(4), a fact that was much discussed during the debates on the bill. *See* H.R. REP. NO. 110-237,[1] at 18 (2007) ("House Report") (discussing Act's

[1] This Report was generated when the Act was originally introduced in the 110th Congress. The current version was enacted without substantive change.

application to pensions); *id*. at 39-40, 45-46 (minority views) (same).

b. Moreover, the disparity in respondents' pensions "result[s] in whole or in part from" a "discriminatory compensation decision or other practice," within the meaning of the Act. LLFPA § 3. *See*, *e.g.*, 155 CONG. REC. H554 (statement of Rep. Nadler, co-sponsor of the Act) (explaining that "our use of the phrase 'discriminatory compensation decision or other practice' should be read broadly, and to include any practice—including, for example, *seniority or pension practices*—that impact overall compensation") (emphasis added).

Congress intended the phrase "discriminatory compensation decision or other practice" to encompass a "wide gamut of compensation practices," including, for example, "the fact pattern in Ledbetter, where sex-based performance evaluations were used in conjunction with a performance-based pay system to effectuate the discriminatory pay." House Report at 5; *see also* 155 CONG. REC. S756-57 (statement of Sen. Mikulski). Opponents of the bill unsuccessfully proposed amendments to delete the reference to "other practices," complaining that this "broad" language would subject too many employment practices to the expanded time limits of the bill. House Report at 41 (minority views); *see, e.g.*, *id*. at 49-50 (describing rejected Keller Amendment); 155 CONG. REC. S697 (statement of Sen. Specter).

AT&T calculated respondents' pensions using a measure of company service that it knew afforded unequal credit for equal service to women who took pregnancy disability leave prior to 1978. That conduct is not meaningfully distinguishable from the

discrimination in *Ledbetter* (setting compensation in reliance upon a discriminatory measure of job performance, rather than company service), a practice this Court described as a "discriminatory pay decision." 127 S. Ct. at 2169. Moreover, Congress included the "other practice" language specifically to cover a practice that might not be considered a compensation decision in itself, but nonetheless "contributes to the employer's decision to set a worker's pay at a certain level," 155 CONG. REC. S757 (statement of Sen. Mikulski), in order to avoid the prospect that courts might employ a "hairsplitting definition of 'compensation decision,'" that would fail to reverse even the result in *Ledbetter* itself, House Report at 5; *see also* 155 CONG. REC. S756-57 (statement of Sen. Mikulski).

In this case, the Court need not explore the outer limits of the "other practice" category. Whatever nexus may be required between the "other practice" and compensation, the link in this case is direct, and certainly no more attenuated than that between performance evaluations and pay. Like performance evaluations, seniority credits are used to determine compensation, especially pensions. *See, e.g.*, *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 766-67 (1976); Petr. Reply Br. 14. Indeed, in some circumstances setting compensation may be the *only* use of a seniority system, particularly if a small company does not have a competitive seniority system for distributing other kinds of job benefits, or if a larger company has separate seniority accrual rules for "benefit" and "competitive" seniority, *cf*. *Bowman*, 424 U.S. at 773 n.33.

The fact that AT&T uses the same seniority calculations for other purposes is immaterial – the same is true of performance evaluations, which are used in making promotion, layoff, and shift assignment decisions, as well as compensation decisions.

Indeed, the link between AT&T's discriminatory seniority practices and reduced compensation is even more direct than the connection between a performance evaluation and a pay raise decision. An employer ordinarily takes performance reviews into account as one of many factors in making what is often a highly discretionary decision on pay. Under AT&T's pension formula, however, every day of uncredited leave automatically results in a reduction in the worker's pension. *See* Petr. Reply Br. 14.

c. AT&T's claim that pregnancy discrimination was lawful at the time it adjusted respondents' NCS dates is both incorrect, *see* Resp. Br. 44-48, and irrelevant under the new Act.

By its terms, the LLFPA declares that every payment that gives effect to a prior "discriminatory compensation decision or other practice" constitutes a new unlawful employment practice. In this way, the LLFPA, like Section 706(e)(2) upon which it was modeled,[2] embraces and expands the *Bazemore* model of compensation discrimination. *See* House Report at 13; Resp. Br. 28. In *Bazemore*, the Court concluded

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[2] Unlike Section 706(e)(2), the LLFPA does not require that the past practice be (a) part of a "seniority system"; or (b) a form of *intentional* discrimination. *Compare* 42 U.S.C. § 2000e-5(e)(2) *with* LLFPA § 3; *see also* House Report at 13, 18-19.

that post-enactment implementation of a pre-Title VII discriminatory pay structure constituted a new act of intentional race discrimination subject to the present requirements of Title VII. 478 U.S. at 395-96. The fact that race discrimination was lawful when the pay was originally set meant that the employer was not liable for that pre-Act conduct. *Id*. at 395. But it did not insulate subsequent reliance upon that pre-Act discriminatory decision from post-Act review. To the contrary, the Court explained that each post-Act implementation of the discriminatory pay decision constituted a new act of illegal intentional race discrimination. *Id*. at 395-96.

The new legislation adopts the same approach and in so doing, implicitly rejects the view that implementation of a past pay decision or other practice is a nondiscriminatory act. *Cf. Ledbetter*, 127 S. Ct. at 2169-70. Instead, the LLFPA treats every application of a discriminatory compensation decision or other practice as a new act *imbued with the original discriminatory intent*. Thus, in this case, both the adjustment of respondents' NCS dates and AT&T's subsequent reliance upon that prior practice constitute acts of intentional pregnancy discrimination. The lawfulness of each – the denial of credit and the setting of the pension – is to be judged by the law as it stood at the time of each separate action.

II. Under the LLFPA, Respondents' Claims Are Timely And Do Not Require Retroactive Application of the PDA.

1. Because the LLFPA applies to this case, respondents' claims are timely. The time for filing an EEOC charge runs from the date upon which "the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). The LLFPA declares that a new "unlawful employment practice occurs . . . each time wages, benefits, or other compensation is paid, resulting in whole or in part from" a "discriminatory compensation decision or other practice." LLFPA § 3. There may be some question whether pension benefits are "paid" with every pension check, or are considered "paid" only once at the time of retirement. *See* LLFPA § 2(4); House Report at 18. But respondents' claims would be timely under either view, as each plaintiff filed a charge within 300 days after being notified of her pension calculation. J.A. 41-47, 54 n.4.

2. The Act also makes clear that respondents' claims do not depend on a retroactive application of the PDA.

As discussed above, the LLFPA does not simply extend the statute of limitations for challenges to past discriminatory compensation decisions and other practices. Instead, it declares that reliance upon such decisions and practices constitutes a new and independent unlawful employment practice, occurring on the date the tainted compensation is paid. *See* LLFPA § 3. Applying the law in effect on the date the alleged unlawful employment occurred – here, Title VII as it stood when AT&T set

respondents' pensions, more than fifteen years after the PDA took effect – does not implicate any retroactivity concerns. *See* Resp. Br. 36-40.

In particular, it does not subject AT&T to liability for pre-PDA conduct. Instead, the effect of the LLFPA is to prohibit an employer from relying on past discriminatory compensation decisions or other practices in making present-day compensation payments. AT&T could have complied with this requirement by using a different, nondiscriminatory measure of company service when it calculated respondents' pensions or by revising their NCS dates to eliminate the discrimination.

In this way, the LLFPA operates much like Title VII's proscription against reliance upon the results of discriminatory employment tests. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). No one ever doubted that employers were prohibited from relying on such tests even if the tests were administered before the effective date of Title VII. Yet no one has ever suggested that precluding employers from relying on pre-enactment tests would give Title VII a retroactive effect. Precluding AT&T from relying on discriminatory measures of company service is no different.

Finally, Congress was well aware that the statute it drafted could subject employers to pension liability for which they had not been planning, a fact opponents emphasized repeatedly. *See, e.g.*, House Report at 45-46 (minority views); 155 CONG. REC. H115, H548 (statements of Rep. Kline); H121 (statement of Rep. McKeon); S712 (statement of Sen. Enzi). The plain text of the statute nonetheless clearly subjects employers to liability for relying upon

past discriminatory compensation decisions or other practices to tender workers reduced pensions. *See supra*, at 3-4.

III. Section 703(h) Does Not Preclude Application Of The LLFPA To This Case.

Nothing in Section 703(h) protects AT&T from application of the new statute.

1. Section 703(h) provides a defense for compensation disparities arising from "a bona fide seniority . . . system,"[3] but only if the disparity is "not the result of an intention to discriminate because of . . . sex." 42 U.S.C. § 2000e-2(h). The statute thus makes a critical distinction between cases in which a *neutral* seniority system perpetuates discrimination outside of the seniority system (*e.g.*, discriminatory refusals to hire or promote), and cases in which the rules of the seniority system are themselves discriminatory (*e.g.*, seniority systems that give half credit for equal work). *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 560 (1977).

Accordingly, Section 703(h) provides no defense to claims authorized by the LLFPA when a plaintiff challenges the present effects of intentionally

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[3] AT&T argued in its reply brief that the discrimination here arose not from the rules of its seniority system, but rather from its "leave policies." Petr. Reply Br. 2-4. In light of that position, AT&T should not be heard to assert that Section 703(h) has any application to this case. At the same time, whether AT&T's discriminatory rules are properly called "leave" or "seniority" rules makes no difference to the question of whether they constitute an "other practice" under the LLFPA.

discriminatory seniority rules, like the ones challenged here.

2. AT&T has argued that at the time the seniority accrual decisions were made, discrimination on the basis of pregnancy was not considered to be a form of intentional sex discrimination under Title VII. Petr. Reply Br. 6-8. But that assertion is of no benefit to AT&T, for two reasons.

First, the LLFPA makes clear that AT&T is not being held responsible for its accrual decision many years ago, but rather for its post-PDA decision to *give effect* to those discriminatory crediting decisions through the payment of pensions that are the "result[] in whole or in part" of a prior "discriminatory compensation decision or other practice." LLFPA § 3. And, as explained above, under the LLFPA, the law imputes to AT&T's pension-setting decision the intent behind the prior "discriminatory compensation decision or other practice" to which it gives effect. That is, because the pension-setting decision gives effect to a practice (*i.e.*, the pre-PDA accrual rules) that intentionally discriminated on the basis of pregnancy, the pension-setting decision is treated as a current act of intentional pregnancy discrimination as well. And at the time AT&T calculated respondents' pensions, pregnancy discrimination indisputably constituted intentional sex discrimination.

Second, Section 703(h) was never intended to protect intentionally discriminatory seniority systems simply because the discrimination may have been lawful at the time the system was adopted or initially applied to a worker. Section 703(h) provides no shelter, for example, to an employer who pays

diminished pensions to black workers hired before 1964 because they accrued no seniority before Title VII took effect. In the language of the statute, the resulting disparities in pensions plainly are "the result of an intention to discriminate because of race, color, religion, sex, or national origin." Section 703(h). Notably, this language does not include the word "unlawful." It is enough that present difference in treatment is the result of prior racial discrimination within the seniority system itself. Indeed, to hold otherwise would render the proviso largely meaningless. If the difference in treatment is the result of an *unlawful* intention to discriminate, then the employer can make no claim that it has acted "pursuant to a bona fide seniority . . . system" in the first place. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 355-56 (1977).[4]

IV. The Court Should Either Affirm In Light Of The LLFPA Or Remand To The Court Of Appeals For Consideration Of The Act's Effect In The First Instance.

For the foregoing reasons, the judgment below should be affirmed in light of the LLFPA. In the alternative, rather than construing the statute in the first instance on the basis of truncated briefing – and without the benefit of oral argument or the views of other courts, the EEOC, or the Solicitor General – the

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[4] Moreover, as discussed in respondents' prior brief, Section 703(h) does not apply to PDA claims, or to facially discriminatory seniority systems such as AT&T's. Resp. Br. 51-53.

Court may wish to consider simply vacating the judgment of the court of appeals and remanding the case for reconsideration in light of the new legislation. *See, e.g.*, *Beltran v. Myers*, 451 U.S. 625 (1981); *Fusari v. Steinberg*, 419 U.S. 379 (1975); *Morris v. Schoonfield*, 399 U.S. 508 (1970).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals, sitting en banc, should be affirmed, or vacated and remanded for reconsideration in light of the LLFPA.

Respectfully submitted,

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February 12, 2009

APPENDIX

Lilly Ledbetter Fair Pay Act of 2009

One Hundred Eleventh Congress

of the

United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the sixth day of January, two thousand and nine

An Act

To amend title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and to modify the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lilly Ledbetter Fair Pay Act of 2009".

SEC. 2. FINDINGS.

Congress finds the following:

(1) The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The Ledbetter decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.

(3) With regard to any charge of discrimination under any law, nothing in this Act is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a charge of discrimination.

(4) Nothing in this Act is intended to change current law treatment of when pension distributions are considered paid.

SEC. 3. DISCRIMINATION IN COMPENSATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended by adding at the end the following:

"(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

"(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.".

SEC. 4. DISCRIMINATION IN COMPENSATION BECAUSE OF AGE.

Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended—

(1) in the first sentence—

(A) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively; and

(B) by striking "(d)" and inserting "(d)(1)";

(2) in the third sentence, by striking "Upon" and inserting the following:

"(2) Upon"; and

(3) by adding at the end the following:

"(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.".

SEC. 5. APPLICATION TO OTHER LAWS.

(a) AMERICANS WITH DISABILITIES ACT OF 1990.—The amendments made by section 3 shall apply to claims of discrimination in compensation brought under title I and section 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq., 12203), pursuant to section 107(a) of such Act (42 U.S.C. 12117(a)), which adopts the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5).

(b) REHABILITATION ACT OF 1973.—The amendments made by section 3 shall apply to claims of discrimination in compensation brought under sections 501 and 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794), pursuant to—

(1) sections 501(g) and 504(d) of such Act (29 U.S.C. 791(g), 794(d)), respectively, which adopt the standards applied under title I of the Americans with Disabilities Act of 1990 for determining whether a violation has occurred in a complaint alleging employment discrimination; and

(2) paragraphs (1) and (2) of section 505(a) of such Act (29 U.S.C. 794a(a)) (as amended by subsection (c)).

(c) CONFORMING AMENDMENTS—

(1) REHABILITATION ACT OF 1973.— Section 505(a) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)) is amended—

(A) in paragraph (1), by inserting after "(42 U.S.C. 2000e-5 (f) through (k))" the following: "(and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation)"; and

(B) in paragraph (2), by inserting after "1964" the following: "(42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation)".

(2) CIVIL RIGHTS ACT OF 1964. — Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended by adding at the end the following:

"(f) Section 706(e)(3) shall apply to complaints of discrimination in compensation under this section.".

(3) AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.—Section 15(f) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(f)) is amended by striking "of section" and inserting "of sections 7(d)(3) and".

SEC. 6. EFFECTIVE DATE.

This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title I and section 503 of the Americans with Disabilities Act of 1990, and sections 501 and 504 of the Rehabilitation Act of 1973, that are pending on or after that date.